87-399

No. 87-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SUPREME COURT OF VIRGINIA, and
its Clerk, DAVID B. BEACH,

Appellants,

v.

MYRNA E. FRIEDMAN,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

MARY SUE TERRY
Attorney General of Virginia

GAIL STARLING MARSHALL
Deputy Attorney General

WILLIAM H. HAUSER
Senior Assistant Attorney General

GREGORY E. LUCYK*
Assistant Attorney General

Attorneys for Appellants

Office of the Attorney General
101 North Eighth Street
Supreme Court Building
Richmond, Virginia 23219
(804) 786-7584

*Counsel of Record

ALPHA GRAPHICS, INC. • WASHINGTON, D.C. • (202) 331-8101

QUESTIONS PRESENTED BY THE APPEAL

1. Is admission to a state's bar, without taking and passing that state's bar examination, a fundamental right protected by the privileges and immunities clauses of Article IV, Section 2 of the United States Constitution?

2. Does the privileges and immunities clause invalidate the Supreme Court of Virginia's determination that there are substantial reasons for requiring an applicant for licensure, who is already admitted to the bar of another state, to either (1) take and pass the Virginia bar examination, or (2) reside in the Commonwealth in lieu of examination, in order to demonstrate a commitment by the applicant of service to the jurisdiction, and to ensure the attainment by the applicant of proficiency in Virginia law and procedure?

3. Does the privileges and immunities clause impose a stringent standard of justification against the Supreme Court of Virginia's rule requiring residence for admission to the bar without examination where there is no clear discrimination against non-residents, and where any resident of any state may be admitted to practice in Virginia by taking and passing the bar examination?

TABLE OF CONTENTS

APPENDICES:

TABLE OF AUTHORITIES

STATUES AND RULES

CONSTITUTIONAL PROVISIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SUPREME COURT OF VIRGINIA, and its Clerk, DAVID B. BEACH,

Appellants,

v.

MYRNA E. FRIEDMAN,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The memorandum order of the United States District Court for the Eastern District of Virginia was not reported and is set forth in the Appendix to the Jurisdictional Statement at Appendix B, p. A-15.

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court has not yet been officially reported, and is included in the Appendix to the Jurisdictional Statement at Appendix A, p. A-1.

JURISDICTION

The appellee, plaintiff in the District Court, brought this action to declare Rule 1A:1 of the Rules of the Supreme Court of Virginia unconstitutional and to enjoin its enforcement by the Virginia Supreme Court, pursuant to 42 U.S.C. § 1983. Jurisdiction in the District Court was predicated upon 28 U.S.C. §§ 1331 and 1343.

The Supreme Court of Virginia now appeals from the judgment of the United States Court of Appeals for the Fourth Circuit. The Court of Appeals issued its opinion affirming the District Court on June 12, 1987, and entered an order denying the Virginia Supreme Court's Petition for Rehearing and Suggestion for Rehearing In Banc on July 22, 1987. The Court of Appeals issued an order staying its mandate on July 22, 1987, and on August 25, 1987, the Virginia Supreme Court filed its Notice of Appeal in the Court of Appeals.

The jurisdiction of this Court on appeal is invoked under 28 U.S.C. § 1254(2). Virginia Supreme Court Rule 1A:1 is a "state statute" within the meaning of 28 U.S.C. § § 1254(2) and 1257. *See e.g., Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985); *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975); and *United States v. Howard,* 352 U.S. 212 (1957).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The privileges and immunities clauses, Article IV, § 2 of the United States Constitution provides in pertinent part:

> "the citizens of each State shall be entitled to all privileges and immunities of Citizens in the several States.

Virginia Supreme Court Rule 1A:1 is set forth in full in the Appendix to this Jurisdictional Statement at Appendix C, p. A-16. In summary, the rule provides for admission to the Virginia Bar without examination for an attorney who has been licensed to practice law in another jurisdiction for at least

five years. The applicant attorney seeking admission without examination must establish that he or she:

> "(a) Is a proper person to practice law;
>
> (b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination;
>
> (c) Has become a permanent resident of the Commonwealth, and;
>
> (d) Intends to practice full-time as a member of the Virginia bar."

The Supreme Court of Virginia has construed the residency provision of Rule 1A:1(c) as a "date of admission" requirement. *Matter of Titus,* 213 Va. 289, 191 S.E.2d 798 (1972). The full-time practice requirement of Rule 1A:1(d) has been interpreted to mean that an applicant must intend to open an office in Virginia for the practice of law and engage regularly in the practice of law in Virginia from that office. *In Re Brown,* 213 Va. 282, 191 S.E.2d 812 (1972).

STATEMENT OF THE CASE

The appellee, Myrna E. Friedman, is a resident of Maryland. She was admitted to the Illinois bar by examination in 1977 and the District of Columbia bar by reciprocity in 1980. She worked as a corporate attorney in the District of Columbia for four years, and prior to that was employed for five years in the office of General Counsel of the United States Navy. In January, 1986, she took a job as Associate General Counsel for ERC International, Inc., a "professonal services company" located in Vienna, Virginia.

In June, 1986, she applied for admission to the Virginia bar without examination pursuant to Rule 1A:1. The cover letter attached to her application stated that she intended to reside in Maryland. Her National Conference of Bar Examiners Questionnaire included with her application also disclosed that she had applied for admission to the Maryland bar at that same time.

On June 17, 1986, the Clerk of the Supreme Court of Virginia responded to Friedman, advising her that because she was not a permanent resident of Virginia, she was not eligible for admission to the Virginia bar without examination, and her application fees were returned to her.

On September 25, 1986, Friedman filed a complaint in the United States District Court for the Eastern District of Virginia against the Supreme Court of Virginia and its Clerk, David B. Beach, asserting that the residency requirement of Rule 1A:1 violated the United States Constitution, including the privileges and immunities clause contained in Article IV, § 2. The issues presented to this Court were initially raised in the district court in cross-motions for summary judgment filed by Friedman and the Virginia Supreme Court. On November 14, 1986, the district court entered an order granting Friedman's motion for summary judgment and declaring the requirement of residence for admission without examination violative of privileges and immunities. On December 19, 1986, the district court entered a further order staying its judgment pending appeal.

The issues now raised in this appeal were asserted by the appellants, the Virginia Supreme Court and its Clerk, in their appeal to the United States Court of Appeals for the Fourth Circuit. On June 12, 1987, a panel of the court of appeals consisting of Winter, Chief Judge, Ervin, Circuit Judge, and Young, United States District Judge for the District of Maryland, sitting by designation, issued its opinion affirming the district court's judgment. The appellant's Petition for Rehearing In Banc was denied on July 22, 1987, and on July 31, 1987, the court of appeals entered an order staying its mandate pending appeal to this Court. Appellants timely filed their Notice of Appeal with the court of appeals.

REASONS WHY PLENARY CONSIDERATION IS REQUIRED

I. THE COURT OF APPEALS' HOLDING THAT ADMISSION TO A STATE'S BAR WITHOUT EXAMINATION IS A FUNDAMENTAL RIGHT PROTECTED BY THE PRIVILEGES AND IMMUNITIES CLAUSE DEPARTS FROM THIS COURT'S PRECEDENTS AND HAS CREATED A CONFLICT AMONG THE CIRCUITS ON THIS ISSUE.

A. Introduction

This case squarely presents the question of whether the Privileges and Immunities Clause of the United States Constitution compels a state to admit to practice before her courts non-resident attorneys who have not established their competence by taking and passing the state's bar examination. The court of appeals' decision declaring appellee Friedman exempt from the Virginia bar examination represents the first federal appellate level holding that admission to a state's bar without examination is a "privilege" protected by Article IV, § 2. In reaching this conclusion, the court of appeals has departed from this Court's decisions defining not only the scope of the privileges and immunities clause, but also the power of the states to regulate their bars, and has directly contradicted holdings of the federal courts in the Seventh and Tenth Circuits.

It is noted that of the twenty-eight states which offer reciprocity admission with no examination, at least seven states[1] require residence in the state as a condition for such admission to supplant the assurances of commitment to the jurisdiction and proficiency in local law otherwise demonstrated by the bar examination. It is also noted that since 1985 at least four states[2] have dropped reciprocal admissions

[1] Illinois, Indiana, Iowa, Ohio, Rhode Island, Virginia, Wyoming.

[2] Arkansas, Kansas, Montana, Utah.

altogether due to the uncertain nature of the law in this area. Plenary consideration by the Court should be given to this case in order to provide specific and authoritative guidance to the states regarding the appropriate constitutional limitations and standards governing their power of discretionary bar admission, and to resolve the conflict which now exists among the Courts of Appeal on this issue.

B. The Court of Appeals' Opinion Departs From the Applicable Decisions of this Court.

Application of the privileges and immunities clause to a state's discrimination against an out-of-state resident requires use of a two-prong test. *United Building and Construction Trades Council of Camden County v. Mayor and Council of Camden*, 465 U.S. 208 (1984). Initially, the court must determine whether the discrimination burdens privileges and immunities protected by the Constitution. *Id.* at 218. If this initial question is answered affirmatively, only then must the court consider (I) whether a "substantial reason" for the discrimination exists, and (ii) whether the discrimination bears a close or substantial relationship to the state's objective.

There is no question that the *practice of law* is a privilege protected by Article IV, § 2. This court so held in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), and struck down a state rule which burdened this privilege by *totally excluding* non-residents from admission to practice.[3] A critical element of this Court's holding, however, was the fact that Kathryn Piper had passed the New Hampshire bar examination, and thus had established by an objective measure that she fulfilled "the same professional and personal

[3]It is noted that *Piper's* holding is not dispositive here, because non-residents are not excluded from practicing law in Virginia. Admission to the Virginia bar may be obtained, without regard to residence, by simply taking and passing the bar examination, and the record in this case establishes that thirteen percent of all active practitioners enrolled in the Virginia bar (1,871 out of 14,314) are non-residents admitted by examination.

qualification [5] required of resident lawyers." *Piper, supra*, 470 U.S. at 283 n.16. Simply stated, *Piper* makes clear that the protected "privilege" of practicing law does not arise until the state's bar admission requirements have been met, including the requirement that the applicant for admission take and pass the state's bar examination.

This conclusion was confirmed by this Court's more recent decision in *Frazier v. Heebe*, ____ U.S. ____, 107 S.Ct. 2607, 96 L.Ed.2d 557 (June 19, 1987), which was handed down after the court of appeals' decision here. In *Frazier*, this Court held that a Louisiana federal district court was not empowered to adopt local rules requiring attorneys admitted to the Louisiana bar by examination, to live in or maintain an office in that state, in order to gain admission to the federal court's bar. The Court rejected the Louisiana court's assertion that non-resident attorneys are "less competent" than resident attorneys, but in so finding relied specifically on the ground that the out-of-state attorneys seeking admission to the federal court's bar had *established* their competence by taking and passing the Louisiana bar examination. The Court stated:

> Indeed, there is no reason to believe that *nonresident attorneys who have passed the Louisiana bar exam* are less competent than resident attorneys. The competence of the former group in local and federal law has been tested and demonstrated *to the same extent* as that of Louisiana lawyers, and its members are equally qualified.

Frazier, supra, ____ U.S. at ____, 96 L.Ed.2d at 566 (emphasis added). This language makes clear the view that out-of-state attorneys are not entitled to a "presumption" of competence unless they have taken and passed the admitting jurisdiction's bar examination. This Court also observed in *Frazier* that the bar examination serves as a "substantial incentive" for the out-of-state lawyer to keep abreast of local rules and procedures, and evidence the non-resident attorney's

willingness and commitment to provide service to the jurisdiction: "A lawyer's application to a particular bar is likely to be based on the expectation of a considerable local practice, since it requires the *personal investment* of taking the state bar examination and paying fees and annual dues." *Frazier, supra,* 96 L.Ed.2d at 566-67. Finally, this Court specifically approved the requirement of an examination for non-resident attorneys as a "more effective means" for ensuring lawyer competence than "complete exclusion" from the bar. *Id.* at 567.

In this case, the court of appeals declared the practice of law to be a protected privilege *per se,* with no requirement that an applicant establish a commitment to the jurisdiction or demonstrate knowledge or proficiency in local law. Indeed, the court of appeals declared that the bar examination itself is a burden on the privilege of practicing law, because it "requires the payment of a fee; it involves the time and expense of becoming acquainted with state law through appropriate study materials or review courses; it results in a period of delay for successful applicants before they may be admitted to the bar . . . and, of course, the bar examination itself involves the risk that even an experienced attorney may fail." *Friedman, supra,* Appendix at 8a. In effect, the court of appeals held that there is a fundamental privilege protected by Article IV, § 2 to practice law without examination in every state which chooses to make some form of reciprocity admission available. This holding is an unwarranted expansion of the privileges and immunities clause, and of this Court's decision in *Piper.*

The opinion in *Piper* analyzed the policies underlying the privileges and immunities clause, observing that the clause applies "[o]nly with respect to those 'privileges' and 'immunities' bearing on the vitality of the nation as a single entity," *Piper, supra,* 470 U.S. at 279, or which may be regarded "'fundamental' to the promotion of interstate harmony." *Id. Baldwin v. Fish and Game Commission of Montana,* 436 U.S. 371 (1978). Discretionary admission without examination, however, has never been regarded as fundamental to our national interest. As this Court stated in *Leis v. Flynt,* 439 U.S. 438 (1979), a case dealing with discretionary *pro hac vice* admission:

> "There is no right of federal origin that perimts [out of state] lawyers to appear in state courts without meeting the state's bar admission requirements. This Court, on several occasions, has sustained state bar rules that excluded out of state counsel from practice altogether or on a case by case basis. *See, Norfolk v. Western R. Co. v. Beatty,* 423 U.S. 1009 (1975), *summarily aff'g* 400 F. Supp. 234 (S.D. Ill.); *Brown v. Supreme Court of Virginia,* 414 U.S. 1034 (1973), *summarily aff'g* 359 F. Supp. 549 (E.D. Va.) *Cf. Hicks v. Miranda,* 422 U.S. 332, 343-345 (1975). These decisions recognize that the Constitution does not require that because a lawyer has been admitted to the bar of one state, he or she must be allowed to practice in another." *Id.* at 433.

The *Leis* case and cases cited therein make clear that there is no overriding national interest in bar admission without meeting a state's bar admission requirements which bears on "the vitality of the nation as a single entity," nor can admission without examination be viewed as "fundamental" to our national interest. So long as a non-resident may gain admission to a state's bar, without regard to his or her residence, by taking and passing the state's bar examination, there is no discrimination which burdens a privilege protected by Article IV, § 2, and no cause of action under the Privileges and Immunities Clause.

C. The Court of Appeals' Decision Creates A Conflict Among the Circuits.

Two other federal courts have held that the requirement of taking and passing a bar examination does not impose a "burden" or "prohibitive condition" on the privilege of engaging in the practice of law, and have affirmed against Artictle IV, § 2 challenges state rules conditioning waiver of the examination upon residence in the state.

This was the conclusion reached by United States Court of Appeals for the Seventh Circuit in *Sestric v. Clark,* 765 F.2d

655 (7th Cir. 1985), *cert. den.*, 106 S.Ct. 862 (1986), a decision directly at odds with the Fourth Circuit's holding in the case at bar. The *Sestric* court upheld against a privileges and immunities challenge the Illinois reciprocity rule which required residence in the state as a condition for admission without examination, although non-residents could be admitted by taking and passing the Illinois bar examination. The Court, distinguishing *Piper*, found that the "privilege" to be evaluated was not the privilege to practice law generally, but the narrower issue of whether there was a protected privilege to practice law without passing the State's bar examination. The *Sestric* Court found that residence was a "substitute commitment" for taking and passing the bar examination, and concluded that while requiring non-residents to take the bar examination may be "inconveniencing," it "would not do much damage to the policy of the privileges and immunities clause." *Sestric, supra*, 765 F.2d at 658-59.

More recently, in *Sommermeyer v. Supreme Court of Wyoming*, 659 F. Supp. 207 (D. Wyo. 1987), the United States District Court for the District of Wyoming reached this same conclusion in upholding against an Article IV, § 2 challenge the Wyoming Supreme Court's residency rule for admission without examination. Again, the court distinguished *Piper*, finding that while the opportunity to pursue the practice of law is a fundamental right, the requirement of the bar examination is not a "prohibitive condition" in the pursuit of that right. *Id.* at 209. The court upheld Wyoming's contention that residence was a substitute for, rather than a supplement, to taking and passing the bar examination. "[T]he Court is hard pressed to see how avoiding the exam, by itself, contributes to national unity, the national economy or any other values which the privileges and immunities clause seeks to protect." *Id.* Sommermeyer has appealed the district court's decision, and that case is now pending in the United States Court of Appeals for the Tenth Circuit, *Sommermeyer v. Supreme Court of Wyoming, et al.*, No. 87-1811 (Filed June 2, 1987).

In light of the foregoing, the Supreme Court of Virginia submits that the decision of the United States Court of Appeals for the Fourth Circuit should not be permitted to stand, and that this Court should note probable jurisdiction in order to consider whether admission without examination is a fundamental privilege protected by Article IV, § 2, and resolve the conflict among the circuits.

II. THIS COURT SHOULD GRANT PLENARY REVIEW TO CLARIFY THE AUTHORITY OF A STATE TO REQUIRE SOME SHOWING OF PROFESSIONAL COMMITMENT AND COMPETENCE AMONG ATTORNEYS ADMITTED TO HER BAR WITHOUT EXAMINATION.

It is well settled that the Virginia Supreme Court has "a compelling interest" in the regulation of the practice of law within its borders, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975), and it may demand "high standards" of personal and professional qualifications, including a commitment to the jurisdiction and a demonstration of competence in Virginia law, from attorneys it admits to practice before its courts. *Piper, supra* at 283-84 n.16; *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). The Virginia Supreme Court has made a determination that for attorneys seeking multiple bar memberships, the required commitment and competence can be established by either taking and passing the bar examination, or by residing and practicing full-time in the Commonwealth. These requirements are interdependent. The full-time practice requirement assures that the untested attorney, through frequent exposure to Virginia cases and clients, will beocme proficient in Virginia law,[4] while residence supplies the lawyer's personal commitment to the jurisdiction.

---

[4]The "full-time practice" requirement of the Virginia rule was upheld against Due Process and Commerce Clause Challenges in *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859 (4th Cir. 1985), *cert denied*, 106 S.Ct. 862 (1986).

which would otherwise be demonstrated by the considerable personal investment required in taking and passing the bar examination. The Virginia Supreme Court also relies upon residence in the State to ensure *compliance* by the untested attorney with full-time practice by requiring the multi-jurisdictional practitioner to *give up* his ties to his former jurisdiction, and to concentrate his practice and commitment to the Virginia bar.

The court of appeals rejected this effort by the Virginia Supreme Court to balance the benefits of reciprocity admission with the compelling need to maintain the personal commitment and professional competence of the bar. The court concluded that there was no substantial reason for the difference in treatment between untested attorneys who live within the state, and those living in other states—asserting that *neither residence nor the bar examination* "furthers the state goal of enhancing the quality of legal practitioners in the state." *Friedman, supra,* Appendix at 12a. Moreover, the court of appeals did not address at all in its opinion Virginia's assertion that residence demonstrated a commitment to the jurisdiction otherwise shown by taking the bar examination. And finally, in striking down Virginia's requirement of residence for admission without the examination only, the court of appeals attempted to distinguish the decision of the Seventh Circuit in *Sestric v. Clark, supra,* and in so doing, implicitly *approved* the residence requirement at issue there. The court of appeals noted that because Illinois did not have a "full-time practice" provision, the residence requirement served a legitimate purpose - to ensure that out-of-state attorneys were not "proposing to supplement their existing practice." *Friedman, supra,* Appendix at 11a.[5] However, this is precisely the reason that Virginia seeks to require residence for admission without

[5]It should be noted that Illinois does require an attorney seeking admission without examination to assert"that upon admission to the bar he will actively and continuously engage in the practice of law in Illinois." *Sestric, supra,* 765 F.2d at 662, *quoting* Ill. Bar Rule 705(d).

examination. It is illogical that this purpose should be "substantial" in the Seventh Circuit but not in the Fourth Circuit. It does not strain reason to conclude that out-of-state applicants who seek membership in the Virginia bar will retain their membership in the bar of one or more other states in which they are admitted.[6] They may be associated with a firm in their jurisdiction of origin, or like many "general practitioners," also operate out of an office in the home. They will likely have an established body of clients who would continue to seek legal services in their home jurisdiction. As a member of the bar of another jurisdiction, the non-resident attorney would have an obligation to support and participate in bar activities, provide pro bono services, and otherwise fullfill his or her "commitment" to service to that jurisdiction. Accordingly, it is much more likely that a non-resident attorney, notwithstanding his or her promise of full-time practice in one state, would be inclined to divide his or her practice and commitment among these competing jurisdictions. The fact that Virginia may have adopted a more effective program that Illinois, including residence *and* full-time practice for ensuring that out-of-state attorneys do not use the vehicle for admission without examination to simply "supplement their existing practice," should not be a ground for striking down the Virginia Supreme Court's efforts to maintain a committed and competent bar. If residence may be upheld, as in *Sestric*, to enforce the untested attorney's asserted commitment to the Virginia bar, then it must likewise be a legitimate measure in the Virginia rule to enforce the untested attorney's asserted commitment to the Virginia bar. In this case, the court of appeals has failed to give appropriate deference to the clearly a legitimate means chosen by the Virginia Supreme court to achieve a balance between the benefits of reciprocity admission with the need to maintain the personal commitment and professional competence of the bar.

[6]The appellee in this case, for instance, is already admitted to the Illinois and District of Columbia bars, and her application for admission to the Virginia bar disclosed that she was seeking admission to the Maryland bar at the same time.

Moreover, the opinion of the court of appeals casts a cloud over the authority of the states to implement discretionary measures in lieu of examination regulating the personal and professional qualifications of practitioners admitted to their bars. The opinion apparently rejects the requirement of a commitment to the jurisdiction as a legitimate state objective; implies that a state may require either residence, or full-time practice, but not both, to ensure proficiency in local law; and contrary to the views of this Court, and the Supreme Court of Virginia, disclaims the propriety or utility of the bar examination altogether. The court of appeals offers no real guidance in this area, but instead directs the Virginia Supreme Court to presume the competence of all non-resident lawyers, and declares that an "annual promise" is enough to establish the non-resident lawyer's commitment to the Virginia bar. This is not sufficient. The Supreme Court of Virginia submits that plenary review should be undertaken in this case to clarify and provide guidance to the states regarding the appropriate constitutional limitations and standards governing their power to establish conditions for discretionary admission to the bar.

Finally, the Virginia Supreme Court does not believe its bar admission certificate should be treated as an "honorarium" or a "collectible" to be hung on law office walls across the country. The Virginia Supreme Court demands, as it has a right to, that its attorneys have a strong commitment to the bar and to clients in Virginia, and that they be knowledgeable and proficient in Virginia law and procedure. The requirement of residency in lieu of the bar examination clearly bears a substantial connection to this legitimate objective. The Court of Appeals' decision should not be permitted to stand. It ignores the teachings of this Court, obscures the authority of the states to exact professional competence, and creates a conflict among the circuits which ought to be resolved by this Court.

CONCLUSION

For the reasons stated, the Supreme Court of Virginia urges this Court to note probable jurisdiction and to schedule this case for plenary consideration by the Court.

Respectfully submitted,

SUPREME COURT OF VIRGINIA;
DAVID B. BEACH, CLERK

Mary Sue Terry
Attorney General of Virginia

Gail Starling Marshall
Deputy Attorney General

William H. Hauser
Senior Assistant Attorney General

Gregory E. Lucyk
Assistant Attorney General

Office of the Attorney General
101 North Eighth Street
Supreme Court Building
Richmond, Virginia 23219
(8040 786-7584
Attorneys for Appellants

APPENDIX

PUBLISHED **APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3170

MYRNA E. FRIEDMAN

Plaintiff- Appellee

versus

SUPREME COURT OF VIRGINIA:
DAVID B. BEACH

Defendant-Appellant

AMERICAN CORPORATE COUNSEL ASSOCIATION

Amicus Curiae

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge. (CA-86-1130-A)

Argued: March 3, 1987 Decided: June 12, 1987

Before WINTER, Chief Judge, ERVIN, Circuit Judge, and YOUNG, United States District Judge for the District of Maryland, sitting by designation.

Gregory E. Lucyk, Assistant Attorney General (Mary Sue Terry, Attorney General of Virginia; Gail Starling Marshall, Deputy Attorney General; James T. Moore, III, Senior Assistant Attorney General on brief) for Appellants; Cornish F. Hitchcock (Alan B. Morrison, Public Citizen Litigation Group; Johh J. Mclaughlin on brief) for Appellee.

CORRECTED OPINION / NEW COVER SHEET

WINTER, Chief Judge:

The Rules of the Supreme Court of Virginia permit some Virginia residents, but prevent nonresidents, from gaining admission to the Virginia bar on motion without having to take the bar examination. The district court ruled that this restriction violates the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution. The defendants appeal and we affirm.

I

Plaintiff Myrna E. Friedman is a member of the Illinois and the District of Columbia bars who currently resides in the state of Maryland and practices law exclusively in the state of Virginia. The plaintiff was admitted to the Illinois bar in 1977 and to the District of Columbia bar in 1980. In January of 1986, plaintiff became Associate General Counsel of ERC International, Inc., which is headquartered in Vienna, Virginia. When she took her position with ERC International, the plaintiff lived in Arlington, Virginia. Indeed, she had lived in Virginia when she practiced law in the District of Columbia. Before she filed her application for admission to the Virginia bar, however, the plaintiff got married and moved to her husband's home in Cheverly, Maryland. The plaintiff continues to work full-time at the corporate office in Virginia.

The plaintiff filed an application requesting admission to the Virginia bar without having to take the bar examination (admission on motion) in June of 1986. Her application was denied. Under the rules of the Virginia Supreme Court, the plaintiff was ineligible for admission to the Virginia bar on motion solely because she does not reside in Virginia. Subsequently, Ms. Friedman filed suit in the district court against the responsible state officials pursuant to 42 U.S.C. § 1983 to invalidate the provision of the Rules of the Virginia Supreme Court which disqualified her for admission to the

state bar on motion. After hearing arguments, the district court entered summary judgment for the plaintiff on the ground that the challenged provision of the Virginia rules violates the Privileges and Immunities Clause of the U.S. Constitution.

II.

Va. Code § 54-67 authorizes the Supreme Court of Virginia to adopt rules which admit experienced lawyers to the Virginia bar without taking the bar examination. The current rule in effect is Rule 1A:1 which provides that an applicant may be admitted on motion if he has been licensed for five years by a jurisdiction which admits Virginia bar members without examination and if he:

> (a) Is a proper person to practice law.
>
> (b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.
>
> (c) Has become a permanent resident of the Commonwealth.
>
> (d) Intends to practice full-time as a member of the Virginia Bar.[1]

---

[1] Rule 1A:1 in full provides:

Any person who has been admitted to practice law before the court of last resort of any state or territory of the United States or of the District of Columbia may file an application to be admitted to practice law in this Commonwealth without examination, if counsel licensed to practice here may be admitted to practice there without examination.

The applicant shall:

(1) File with the clerk of the Supreme Court at Richmond an application, under oath, upon a form furnished by the clerk.

The Virginia Supreme Court interprets the full-time practice requirement of Rule 1A:1(d) to mean that an applicant must show that he intends to open an office in Virginia for the practice of law and to engage regularly in the practice of law in Virginia. In Re Brown, 213 Va. 282, 191 S.E.2d 812, 815 n. 3 (1972).

Virginia Rule 1A:1 has been challenged on federal constitutional grounds on at least two prior occasions. A due process challenge to the Virginia Rule was rejected in Brown v. Supreme Court of Virginia, 359 F. Supp. 549 (E.D. Va.), *aff'd mem.* 414 U.S. 1034 (1973). In addition, we have rebuffed a challenge to the full-time practice requirement of

---

(2) Furnish a certificate, signed by the presiding judge of the court of last resort of the jurisdiction in which he is entitled to practice law, stating that he has been so licensed for at least five years.

(3) Furnish a report of the National Conference of Bar Examiners concerning his past practice and record.

(4) Pay a filing fee of fifty dollars.

Thereafter, the Supreme Court will determine whether the applicant:

(a) Is a proper person to practice law.

(b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.

(c) Has become a permanent resident of the Commonwealth.

(d) Intends to practice full-time as a member of the Virginia bar.

In determination of these matters the Supreme Court may call upon the applicant to appear personally before a member of the Court or its executive secretary and furnish such information as may be required.

If all of the aforementioned matters are determined favorably for the applicant, he shall be notified that some member of the Virginia bar who is qualified to practice before the Supreme Court may make an oral motion in open court for his admission to practice law in this Commonwealth.

Upon the applicant's admission, he shall thereupon in open court take and subscribe to the oaths required of attorneys at law, whereupon he shall become an active member of the Virginia State Bar.

Rule 1A:1(d) under the Due Process and Commerce Clauses of the Constitution. Goldfarb v. Supreme Court of Virginia, 766 F.2d 859 (4 Cir. 1985). These cases establish that Virginia Rule 1A:1, taken as a whole, and the full-time practice requirement of Rule 1A:1(d) serve a legitimate state interest by ensuring that attorneys admitted to the bar are familiar with the laws of Virginia. *See also* In Re Titus, 213 Va. 289, 191 S.E.2d 798 (1972); In Re Brown, *supra.* No court, however, has addressed the issue presented in this case:

Does the residency requirement of Rule 1A:1(c), which limits admission without examination to Virginia residents, violate the Privileges and Immunities Clause of Article IV, § 2 of the Constitution. *See* Goldfarb v. Supreme Court of Virginia, 766 F.2d at 865 n. 7.

III.

Article IV, § 2 of the Constitution states that the "citizens of each State shall be entitled to all privileges and immunities of Citizens in the several States." The district court, applying the test for prohibited discrimination against the citizens of the several states, found that Virginia Rule 1A:1 violated Article IV, § 2, relying principally on the Supreme court's recent decision in Supreme Court of New Hampshire, v. Piper, 470 U.S. 274 (1985).

In *Piper*, the Court held that the practice of law is a privilege that is protected by Article IV, § 2 of the Constitution. 470 U.S. at 280-81. The practice of law, the court reasoned, is important to the national economy and is an important part of commerical intercourse between the states. *Id.* Moreover, out-of-state lawyers play an important role in protecting the wellbeing of a federal union by representing persons who raise unpopular federal claims. *Id.*, 470 U.S. at 281-82.

The district court held that Rule 1A:1(c) impermissibly burdens the privilege of practicing law in Virginia by requiring only nonresident attorneys who decide to practice full-time in Virginia to take a bar examination in order to qualify for the practice of law while some resident attorneys are afforded that privilege without having to take the examination. The state maintains that the district court misapplied *Piper* in reaching this conclusion because there is no fundamental right to practice law without taking a bar examination. *See* Leis v. Flynt, 439 U.S. 438 (1979). We find the state's argument unpersuasive.

The Privileges and Immunities Clause protects more than those rights which are considered fundamental individual rights protected by the Fourteenth Amendment. *Piper, supra,* 470 U.S. at 281 n.10; Hicklin v. Orbeck, 437 U.S. 518 (1978). In the modern view, Article IV, § 2 attempts to "fuse into one Nation a collective of independent, sovereign States." Toomer v. Witsell, 334 U.S. 385 (1985). [2] Thus, the Court has found on many occasions that the Clause guarantees to the citizens of the nation that they may do business within a state on the same terms as the citizens of that

[2]The purpose of the Clause is stated in the provision of the Articles of Confederation from which the Article IV, § 2 of the Constitution was derived:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively.

Art. of Confed. art. IV, in 9 J. of Continental Congress 908 (W. Ford ed. 1906). The shorter version of this provision which was included in the Constitution was not intended to change the substantive meaning of the Clause. Austin v. New Hampshire, 420 U.S. 656, 661 (1975).

state. *Id.* In doing so, the Court has extended the protection of the Privileges and Immunities Clause to a variety of economic interests which are not considered fundamental rights within the sphere of the Fourteenth Amendment. *See* Hicklin v. Orbeck, *supra* (invalidating job preferences for state residents); Toomer v. Witsell, *supra* (invalidating a license fee for shrimp boats operated by nonresidents); Ward v. Maryland, 12 Wall 418 (1871) (invalidating special fees to nonresidents for licenses to trade in goods not manufactured in Maryland). [3] The Court has extended the protection of the Privileges and Immunities Clause to those rights which are 'fundamental' to the promotion of interstate harmony." *Piper, supra,* 470 U.S. at 279; Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 388 (1978). Indeed, in *Piper* the Court held that the practice of law was protected by § 2 of Article IV although the right to practice law has never been found to be a fundamental right. Thus, the Virginia rule in this case unquestionably burdens a privilege which is protected by Article IV, § 2.

The Virginia Rule is subject to scrutiny under Article IV, § 2 because the Rule has disproportionate impact on the practice of law by citizens of the several states who are not residents of Virginia. The effect on nonresidents is obvious because the state has chosen to distinguish between citizens of the state and noncitizens on the face of the enactment; the discriminatory effect of Rule 1A:1 falls entirely on nonresidents of Virginia.

[3]In Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978), the Court held that the interest of nonresidents in the sport of elk hunting in a state does not fall within the purview of the Privileges and Immunities Clause because elk hunting is not an activity which is basic to the well-being of the union. 436 U.S. at 388. The decision distinguished the sport of elk hunting from the pursuit of "common callings within the state" for which the state may not place unreasonable burdens on nonresidents of the state. 436 U.S. at 383.

It is true that Rule 1A:1, taken as a whole, burdens many residents of Virginia as well as nonresidents. The Rule allows a person to enter practice on motion only if he has been a member of the bar of another state for five years. Residents of the state who begin their career by practicing in Virginia must take a bar examination; they may never be admitted to the bar on motion. In addition, the Rule also affects new residents who do not meet this five year continuous practice requirement. However, the provision precluding the plaintiff's admission on motion to the Virginia bar, the residency requirement of Rule 1A:1(c), applies on its face exclusively to nonresidents. While other provisions of the Rule — such as the full-time practice requirement or the requirement that an applicant for on-motion admission be a member of the bar of another state — may burden residents of Virginia, the effect of these provisions does not remove or detract from the facial disparity in the treatment of citizens and noncitizens by Rule 1A:1(c).

The requirement that nonresidents who are committed to practicing in the state of Virginia must take the bar examination certainly imposes a burden on the pratice of law that justifies application of the scrutiny required by Article IV, § 2. Taking a bar examination requires the payment of a fee; it involves the time and expense of becoming acquainted with the state law through appropriate study materials or review courses; it results in a period of delay for successful applicants before they may be admitted to the bar which may have a serious, albeit temporary, effect on their legal practice; and, of course, the bar examination itself involves the risk that even an experienced attorney may fail. The rule imposes these burdens on nonresident citizens who are not represented in

the Virginia Assembly. [4] The effect of Rule 1A:1(c) is to deter attorneys who are leaving their previous practice to practice in this region, and who plan to live in Washington or Maryland, from competing with members of the Virginia bar. The Rule also encourages persons who will practice law in Virginia to purchase a home in Virginia instead of elswhere. Thus, the provision is arguably designed as a means of economic protectionism with the attendant adverse effect of disrupting interstate harmony. [5] We find, therefore, that these burdens justify application of the traditional test for scrutinizing discrimination against the citizens of other states.

Virginia contends that this analysis is inapplicable because Rule 1A:1 does not absolutely prohibit the practice of law in Virginia by nonresidents. The Court, however, has closely scrutinized burdens imposed by a state such as license fees or hiring preferences under Article IV, § 2 even though such burdens are not wholesale restrictions on the privileges and immunities of citizens of the union. Hicklin v. Orbeck, *supra* (job preferences); Toomer v. Witsell, *supra* (license fee); Ward v. Maryland, *supra*, (fees). Under the

---

[4] Justice Stone pointed out the problem of state legislation which burdens persons who do not reside within the state in South Carolina State Highway Department v. Barnwell Brothers, 303 U.S. 177, 185 n.2 (1938):

> When the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.

See, generally, J.N. Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L..J. 425 (1982).

[5] The Court in *Piper* noted that one reason that has been expressed for state rules raising barriers to admission to the bar by nonresident attorneys is to "erec[t] fences against out-of-state lawyers . . . to protect [in-state] lawyers from professional competition." 84 L.Ed.2d at 214 n.18 (quoting a former president of the American Bar Association).

state rule struck down in *Piper*, in fact, the plaintiff "was not excluded totally from the practice of law in New Hampshire." *Supra*, 470 U.S. 277 n. 2. Nonresident attorneys were authorized to appear before the state courts of the New Hampshire *pro hac vice*. However, this alternative, like a bar examination, burdened out-of-state lawyers by precluding them from practicing in New Hampshire on the same terms as a resident attorney. *Id.*

Defendants cite Sestric v. Clark, 765 F.2d 655 (7 Cir. 1985), *cert. denied*, _____ U.S. _____ (1986) as authority to support the validity of the challenged restriction. In that case, the Seventh circuit analyzed a provision of Illinois law which allowed new residents to become a member of the state bar on motion, but required nonresidents to take a bar examination. The court concluded that the Illinois rule affected old residents who were not eligible for admission on motion, and new residents who did not meet a continuous practice requirement, as well as nonresident applicants to the bar. 765 F.2d at 659-60. As a result, the court concluded that the statute raised no suspicion that it was an arbitrary limit on the privileges of nonresident citizens because the rule primarily affected resident citizens.

The Seventh Circuit also ruled that the Illinois rule involved no "net burden" to nonresident attorneys because applicants to the bar who moved to Illinois were likely to be giving up their previous practice in another state, while applicants who sought to maintain their residency in another state were more likely seeking to add to their current practice. Thus, resident attorneys escaped a bar examination but lost an established practice, while nonresident attorneys faced a bar examination but gained an additional area for their law practice. *Id.* Based on this assessment of the costs and benefits of the Illinois residency requirement, the court concluded that the plaintiff had failed to make out a prima facie case under the Privileges and Immunities Clause.

We need not consider the merits of the decision in *Sestric*, because the provision of Illinois law discussed their omitted Virginia's requirement that applicant intend to practice full-time in the state. The addition of this requirement alters the results of the Seventh Circuit's analysis. Rule 1A:1(c) requires the plaintiff to become a permanent resident of Virginia in order to qualify for admission on motion, over and above the requirement of the Rule that persons be committed to practicing full-time in Virginia. The provision exclusively burdens citizens of the several states who intend to practice law full-time within the confines of the state of Virginia, but who are not residents of Virginia. Seen in this light, Rule 1A:1(c) operates as a discrimination solely against nonresidents who are otherwise committed to practicing law in the state of Virginia.

Because the Virginia rule incorporates a requirement that attorneys be committed to practicing full-time within Virginia, the rule places a "net burden" on nonresidents instead of residents. The Seventh Circuit reasoned that nonresident applicants to the state bar were undoubtedly proposing to supplement their existing practice, but Virginia's rule requiring full-time practice within the state prevents the drawing of that inference here. The challenged provision of the Virginia rule requires attorneys who are moving their practice to Virginia to give up their previous practice and take the Virginia bar examination if they choose to reside across the state line. The rule thus places a significant burden on nonresident citizens without, as distinguished from Illinois, offering them the benefit of an interstate practice.

IV.

Based on the preceding analysis, this case involves a straightforward application of the two part test for scrutiny under Article IV, § 2. Under this test, discrimination against nonresidents is valid if: (1) there is a substantial reason for

the difference in treatment; and (2) the discrimination bears a substantial relationship to the state's objective. *Piper, supra*, 470 U.S. at 284; United Building & Construction Trades Council v. Mayor & Council of Camden, 465 U.S. 208 (1984). In deciding whether the discrimination bears a substantial relationship to the state's objective, we may consider the availability of less restrictive means to achieve that end. *Id. See, e.g.*, Toomer v. Witsell, *supra*. 334 U.S. at 398-99.

We conclude that the Virginia Rule fails to survive the scrutiny which this test imposes. Virginia suggests two reasons to justify the different treatment which it accords to residents and nonresidents seeking admission on motion. First, Virginia argues that the requirement of a bar examination furthers the state goal of enhancing the quality of legal practitioners in the state. The Court in *Piper* unequivocally rejected this rationale insofar as it seeks to justify discrimination against nonresident attorneys.[6]

[6]In *Piper*, New Hampshire offered four justifications for its refusal to admit nonresidents to the bar, all of which were rejected as unreasonable justifications for such discrimination. The state in that case asserted that nonresident members would be less likely (1) to become familiar with local rules and procedures; (2) to behave ethicallly; (3) to be available for court proceedings; and (4) to do pro bono and other volunteer work in the state. 470 U.S. at 285.

The court found that there was no evidence to support the State's claim that nonresidents were less likely to acquaint themselves with local rules and procedures and found the prospect unlikely because of the attorney's interest in zealously protecting the interests of her client. *Id.* The Court rejected the State's second justification because there is no reason to believe that nonresident lawyers are less ethical than attorneys who are residents of New Hampshire. *Id.* The State's third justification was rejected in *Piper* because the Court reasoned that a high percentage of lawyers who take the bar examination would be committed to residing in places reasonably convenient to the state. In addition, less restrictive means were available to the State to protect its interests, such as requiring distant counsel to retain a local attorney in individual cases. *Id.* at 287. Finally, the Court rejected the suggestion that nonresident attorneys would be less likely to engage in pro bono work because most attorneys who would become members of the state bar would endeavor to perform their share of these services and because the less restrictive alternative of requiring such volunteer representation was available. *Id.*

Certainly we perceive no nexus between residence and lawyer competence and Virginia points to none.

Virginia also argues that the residency requirement facilitates compliance with the requirement that an attorney must intend to practice full-time in Virginia, as required by Rule 1A:1(d) because a resident of Virginia is more likely to comply with this commitment than a nonresident. Virginia has established no enforcement machinery to monitor compliance with its full-time practice requirement. Its argument thus boils down to the assertion that residents are more likely to honor their commitment to practice full-time in Virginia than are nonresidents. Virginia offers no evidence to support this argument, and its logic is tenuous. In agreement with the district court we do not think that it is more likely that a resident will be more truthful than a non resident in stating his intention, or in carrying out his commitment, to practice full-time in Virginia. As a result, we think that this objective cannot survive scrutiny.

Thus, we conclude that the Virginia rule is overbroad because it penalizes nonresident attorneys even though they are not more likely than resident attorneys to be untruthful about their intention to practice full-time in Virginia. As the plaintiff suggests, a less restrictive alternative available to the state would be to require attorneys to renew each year their promise to practice full-time in Virginia. A rule requiring a renewed commitment to full-time practice would ensure that attorneys, the majority of whom do presumably subscribe to the basic canons of ethics, would be reminded of the commitment which they agreed to fulfill. This alternative would have the same beneficial effect on compliance with Virginia's full-time practice requirement as the current rule, without placing special burdens on the citizens of the several states.

Moreover, Virginia's requirement that applicants maintain an office in Virginia renders redundant the Rule's requirement that an applicant maintain a permanent residence in the state. If an office is to be maintained in

Virginia, it is likely that most nonresidents will live in places reasonably convenient to Virginia. In fact, the office requirement adopted by the Virginia Supreme Court facilitates compliance with the full-time practice requirement in nearly the identical manner as the residency requirement because it ensures that an attorney will maintain a tangible in-state presence and interest in the laws of the state which is roughly equivalent to the commitment that results from in-state residence. Thus, the requirement that an attorney maintain an office in the state achieves the very goal that is sought to be reached by the residency requirement of the current Rule; but, at the same time, the in-state office requirement does not subject citizens of the states neighboring Virginia to unfair discrimination. *Cf.* Goldfarb v. Supreme Court of Virginia, *supra*, 766 F.2d at 862-65 (full-time practice requirement of Virginia Rule 1A:1(d) does not constitute economic protectionism in violation of Commerce Clause). While it may be argued that reliance on the presence of an office in the state to enforce the full-time practice requirement would permit attorneys to evade the Rule by establishing a sham office in order to have a mailing address within Virginia, it is equally true that an attorney seeking to evade the current Rule may just as easily establish a sham residence within the confines of the state.

Finally, we agree with the plaintiff that Virginia could assure compliance with ther full-time practice requirement if it were combined with a rule requiring annual renewals of an attorneys affidavit stating that he maintains an office in Virginia, in addition to practicing full-time within the state. This would be a far less drastic alternative than the current residency requirement.

The Plaintiff also contends that the Virginia Rule violates the Equal Protection Clause and the Commerce Clause. In view of our conclusion about the Privileges and Immunities Clause, we need not consider these issues.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MYRNA E. FRIEDMAN, **CIVIL ACTION NO. 86-1130-A**

v. *Plaintiff,*

SUPREME COURT OF VIRGINIA,
et al., *Defendants*

ORDER

For the reasons stated from the bench, the court is of the opinion that the plaintiff's claims under the Commerce Clause and the Equal Protection Clause are without merit. However, the court finds that where the plaintiff agrees to practice full time as a member of the Virginia bar and has met the five year practice requirement in another state, the requirement of permanent residence bears no substantial relationship to the objectives advanced by the Commonwealth of Virginia, namely, proficiency in the practice of law, a commitment to that jurisdiction, and an assurance of compliance with the agreement to practice full time. The court therefore concluding that in this case the permanent residence requirement violates the Privileges and Immunities Clause, it is hereby ORDERED that:

1. The motion of the plaintiff for summary judgment is granted.

2. The motion of the defendants for summary judgment is denied.

3. It is DECLARED that the requirement of permanent residence in Rule 1A:1 of the Rules of the Supreme Court of Virginia under the circumstances of this case is invalid as violative of the Privileges and Immunities Clause of the United States Constitution.

Alexandria, Virginia
November 14th, 1986

s/Albert v. Bryan, Jr.
United States District Judge

APPENDIX C

Rule 1A:1. Foreign Attorneys—When Admitted to Practice in This State Without Examination.

Any person who has been admitted to practice law before the court of last resort of any state or territory of the United States or of the District of Columbia may file an application to be admitted to practice law in this Commonwealth without examination, if counsel licensed to practice here may be admitted to practice there without examination.

The applicant shall:

(1) File with the clerk of the Supreme Court at Richmond an application, under oath, upon a form furnished by the clerk.

(2) Furnish a certificate, signed by the presiding judge of the court of last resort of the jurisdiction in which he is entitled to practice law, stating that he has been so licensed for at least five years.

(3) Furnish a report of the National Conference of Bar Examiners concerning his past practice and record.

(4) Pay a filing fee of fifty dollars.

Thereafter, the Supreme Court will determine whether the applicant:

(a) Is a proper person to practice law.

(b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.

(c) Has become a permanent resident of the Commonwealth.

(d) Intends to practice full time as a member of the Virginia bar. In determination of these matters the Supreme Court may call upon the applicant to appear personally before a member of the Court or its executive secretary and furnish such information as may be required.

If all of the aforementioned matters are determined favorably for the applicant, he shall be notified that some member of the Virginia bar who is qualified to practice before the Supreme Court may make an oral motion in open court for his admission to practice law in this Commonwealth.

Upon the applicant's admission he shall thereupon in open court take and subscribe to the oaths required of attorneys at law, where upon he shall become an active member of the Virginia State Bar.

APPENDIX D

UNITED STATES OF APPEALS FOR THE FOURTH CIRCUIT

NO. 86-3170

MYRNA E. FRIEDMAN,

Plaintiff/Appellee

v.

SUPREME COURT OF VIRGINIA; DAVID B. BEACH,

Defendants/Appellants

AMERICAN CORPORATE COUNSEL ASSOCIATION,

Amicus Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

NOTICE OF APPEAL

The Supreme Court of Virginia and its Clerk, David B. Beach, defendants/appellants, hereby appeal to the Supreme Court of the United States from the decision of the United States Court of Appeals for the Fourth Circuit, dated June 12, 1987, affirming the district court, and from the Court's denial

of appellants' Petition for Rehearing and Suggestion for Rehearing In Banc, dated July 21, 1987. Appeal is taken pursuant to 28 U.S.C. § 1254(2).

Respectfully submitted,

SUPREME COURT OF VIRGINIA, *et al.*

By: /s/ Gregory E. Lucyk

MARY SUE TERRY
Attorney General of Virginia
GAIL STARLING MARSHALL
Deputy Attorney General
WILLIAM H. HAUSER
Senior Assistant Attorney General
GREGORY E. LUCYK
Assistant Attorney General

Office of the Attorney General
101 North Eighth Street
Supreme Court Building
Richmond, Virginia 23219
(804) 786-7584

CERTICIATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing NOTICE OF APPEAL was mailed, postage prepaid, this 25th day of August, 1987, to Cornish F. Hitchcock, Esquire, Public Citizen Litigation Group, 2000 P St., N.W., Suite 700, Washington, D.C. 20036; John J. McLaughlin, Esquire, 313 Park Avenue, Suite 400, Falls Church, Virginia 22046, counsel for plaintiff; and Timothy C. Winslow, Esquire, American Corporate Counsel Association, 1225 Connecticut Avenue, N.W., Suite 202, Washington, D.C. 20036, counsel for amicus, the American Corporate Counsel Association.